The Sherwin-Williams Company *and* Local 1961, Brotherhood of Painters and Allied Trades. Cases 10-CA-15355 and 10-CA-15741

March 30, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On October 7, 1980, Administrative Law Judge William N. Cates issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and the Charging Party filed an answering brief to Respondent's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

We have modified the Administrative Law Judge's proposed notice to conform with his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, The Sherwin-Williams Company, Morrow, Georgia, its officers, agents, successors, and assigns, shall take the actions set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Respondent's reliance on *N.L.R.B.* v. *Cone Mills Corporation*, 373 F.2d 595 (4th Cir. 1967), to support its contention that benefits were lawfully withheld is misplaced. Here, upon expiration of the collective-bargaining agreement between Respondent and the Charging Party, Respondent immediately announced to the Charging Party that it had decided to discontinue the disability benefits which had been provided for in the expired agreement. Respondent gave no notice to the Charging Party of the impending change; nor did it provide any opportunity for bargaining. Neither *Cone Mills* nor any other precedent stands for the proposition that an employer with an outstanding bargaining obligation can unilaterally alter or change an existing benefit, which is regarded as a mandatory subject of bargaining without prior notice or bargaining. See *Curley Printing Company, Printing Industries of Nashville, Inc., and Printing Industries of America, Inc.*, 169 NLRB 251, 257 (1968).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT withhold disability benefits payable to each of the five employees named in the complaint in this proceeding throughout the period October 25, 1979, to January 4, 1980, or otherwise discriminate against employees, because of any union activity by any of our employees, including strikes.

WE WILL NOT unilaterally change wages, hours, working conditions, and other terms and conditions of employment of our employees by refusing to pay our employees accrued holiday benefits.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make our employees whole for the loss of any disability benefits they suffered as a result of our unlawful conduct, with interest.

WE WILL make Roy Odum whole for any loss of holiday pay he suffered during the period October 25, 1979, to January 4, 1980, with interest.

WE WILL, upon request, bargain in good faith with Local 1961, Brotherhood of Painters and Allied Trades, concerning any proposed change in the wages, hours, working conditions, and terms and conditions of employment of our employees in the following collective-bargaining unit:

All production maintenance and raw material warehouse employees, and janitors at Respondent's Morrow, Georgia, plant but excluding office clerical employees and the plant clerical, finished product warehouse employees, laboratory assistants, guards and supervisors as defined in the Act.

THE SHERWIN-WILLIAMS COMPANY

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge: These cases were heard before me on July 15, 1980, at Atlanta, Georgia. Pursuant to a charge and an amended charge filed on January 11 and February 25, 1980, respectively, in Case 10-CA-15355 by Local 1961, Brotherhood of Painters and Allied Trades, hereinafter Union or Charging Party, a complaint was issued on February 25, 1980, against The Sherwin-Williams Company, hereinafter Respondent or Employer, alleging that on or about October 25, 1979, Respondent unlawfully withheld disability benefits payable to certain names employees in violation of Section 8(a)(3) and (1) of the Act. An amendment to complaint in Case 10-CA-15355 issued June 4, 1980, in which one of the previously named employees alleged to have had disability benefit payments withheld was deleted. Further, pursuant to a charge filed by the Union on April 18, 1980, in Case 10-CA-15741, a complaint, order consolidating cases, and notice of hearing was issued on June 4, 1980, against Respondent alleging that on or about January 6, 1980, Respondent, in violation of Section 8(a)(5) and (1) of the Act, unilaterally eliminated pay for certain specified holidays which allegedly had accrued pursuant to a collective-bargaining agreement between the Union and Respondent, and further alleges that Respondent unlawfully withheld accrued holiday pay from a specifically named employee on or about January 6, 1980, in violation of Section 8(a)(3) and (1) of the Act. On June 10, 1980, an errata was issued to the amendment to complaint in Case 10-CA-15355 reinstating the name of the individual previously eliminated by the amendment to complaint. Answers to the complaints were duly filed by Respondent in which it denied having violated the Act.

All parties appeared at the hearing and were afforded full opportunity to present oral and written evidence, and to examine and cross-examine witnesses. Upon the entire record, together with careful observation of the demeanor of the witnesses and consideration of briefs filed by counsel for the General Counsel, Charging Party, and Respondent, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is an Ohio corporation with an office, plant, and place of business located at Morrow, Georgia, where it is engaged in the manufacture of paint. During the 12-month period preceding issuance of the original complaint, Respondent sold and shipped products valued in excess of $50,000 from its Morrow, Georgia, location directly to points located outside the State of Georgia. The complaints allege, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaints allege, the answers admit, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent and Union have been parties to a collective-bargaining agreement at least since 1967.[1] The contract in effect at all times material to these cases expired by its terms on October 25, 1979, following a request of the Union to open the agreement for negotiations. The Union and Respondent were unable to arrive at a new agreement on or before October 25, 1979. The Union called a strike at Respondent's Morrow, Georgia, plant that commenced at 12:01 a.m., October 25, 1979. The strike continued until January 4, 1980. There is no contention that the strike was other than an economic strike. The Teamsters Union did not strike Respondent as such, but notified Respondent that it would honor, and did in fact honor, the Union's picket line. The collective-bargaining agreement that expired on October 25, 1979, contained in article XV thereof a disability benefit plan. The disability benefit plan as set forth in the contract between the parties was actually a summary of a disability benefit plan which was a separate document. The provisions of the disability benefit plan called for benefits to be paid to disabled employees based upon the length in complete years of service an employee had worked for Respondent. Additionally, the collective-bargaining agreement listed certain days as agreed upon holidays which included: Thanksgiving Day; the day after Thanksgiving; December 24; Christmas Day; December 31; and New Year's Day.

B. *Alleged Withholding of Disability Benefits*

The complaint in Case 10-CA-15355 with its amendment and errata alleges that Respondent withheld disability benefits payable to its employees Ann Roberts, Alton Lyon, Dorothy Johnson, Marvin Grissom, and Charles Tumlin. The complaint further alleges that the named employees were entitled to the disability benefits under the collective-bargaining agreement. The complaint further alleges that the named employees did not participate in the strike that commenced at Respondent's plant on October 25, 1979. The complaint alleges that the with-

[1] The certified appropriate unit consists of:

> All production maintenance and raw material warehouse employees, and janitors at Respondent's Morrow, Georgia, plant but excluding office clerical employees and the plant clerical, finished product warehouse employees, laboratory assistants, guards and supervisors as defined in the Act.

The Union and General Teamsters Local Union No. 528, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, were jointly certified by the Board on October 5, 1967, following a Board-conducted election on September 27, 1967. Therefore, the contract between Respondent and the Union is a contract between Respondent and both unions. The Painters Union (referred to in this Decision as Union) represents the production employees while the Teamsters represent the raw materials, warehouse, finished goods warehouse, and associated products warehouse employees.

holding of the disability benefits from the named employees whose disability had commenced before the strike and whose disability continued after the strike constituted a violation of Section 8(a)(3) and (1) of the Act.

It is undisputed that the day the strike commenced, five employees, namely: Ann Roberts, Alton Lyon, Dorothy (Owens) Johnson, Marvin Grissom, and Charles Tumlin, were disabled for one reason or another and as such were unavailable for work. Each of the employees were at least on October 24, 1979, the last day before the strike and the expiration of the collective-bargaining agreement, receiving disability benefits from Respondent.

Respondent's nationwide labor relations official, Edward Skinner, acknowledged that he told representatives of the Union at a meeting which took place on October 25, 1979, between Respondent and the Union that the disability benefits of the disability plan would cease being effective that date. Local 1961 business representative, Charles W. Cook, Jr., testified, and I credit his testimony, that he protested to Respondent the termination of the disability benefits. Disability benefits were in fact discontinued by Respondent, effective October 25, 1979. Skinner testified that Respondent had never paid disability benefits to employees who were on any type of disability prior to a strike where the disability continued into the advent of a strike. Skinner acknowledged that discontinuance of the disability benefits was not discussed with the Union in negotiations prior to the termination of those benefits at the commencement of the strike on October 25, 1979. Further, Respondent acknowledged that it was unaware whether any of the named employees who were on disability at the commencement of the strike had demonstrated any public support for the strike. Each of the disabled employees were instructed by Chief Shop Steward Western Howard, Jr.,[2] not to participate in the strike, not to walk the picket line, or do anything to participate in the strike. It is undisputed that Howard attempted to file with Respondent Personnel Director Faye Menhart a grievance on November 5, 1979, protesting the discontinuation of the disability benefits. The grievance was not accepted by Respondent with the stated reason by Respondent that there was no contract on which to base the grievance.

I find that Respondent violated Section 8(a)(3) and (1) of the Act by terminating disability benefits to its named employees who were physically unable to work on and after October 25, 1979, because other employees actively employed at Respondent's facility went out on strike. Respondent terminated the disability benefits immediately upon the commencement of the strike and at a time when it had no knowledge as to whether the disabled employees ratified or actively supported the strike and further at a time when the union representative was protesting the termination of those benefits by Respondent. The termination of those benefits was unlawfully intended to coerce and restrain protected union activity with respect to the strike, by imposing a sanction against certain unit employees if others in the unit engaged in strike activity. *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB 1143 (1979). I reject Respondent's argument that because the collective-bargaining agreement had expired, it was privileged to discontinue disability payments to employees who were disabled at and after the time of the strike and expiration of the contract between the parties.[3] I further reject Respondent's contention that the named employees could not reasonably have expected to work but for their disability, solely because of a strike by other employees who worked in the area of the plant where they would have worked.

Having found it was an unfair labor practice for Respondent to have discontinued disability payments on the first day of the strike, the individual employees must be made whole for what they lost throughout the time period starting October 25, 1979, and ending on the date which each individual employee became well enough to return to work, if in fact the employee recovered sufficiently during the 10-week strike to return to work. Inquiry into the question of how long an individual remained on disability, and therefore how much the individual is due, is a matter developed primarily at the compliance stage of Board proceedings. However, evidence was developed in this regard with respect to when certain of the employees named in the complaint were sufficiently well to return to work and whether any of the named employees enmeshed themselves in the ongoing strike activity to such an extent as to terminate their right to continued disability benefits.

Employee Ann Roberts testified, and I credit her testimony, that she worked for Respondent as a paint filler on the quart paintline labeling and packing quarts of paint into boxes and then assisted the other employees in stacking those boxes on pallets. Roberts had been on a nonjob related disability for about a month prior to the strike. This disability continued throughout the strike. Robert was released without restrictions and returned to work on January 7, 1980. Roberts was released for light duty in early December 1979. Roberts indicated the restrictions were no lifting, bending, or stooping. Roberts' uncontradicted testimony indicated her job required lifting, bending, and stooping. The uncontradicted testimony of Roberts, Union Representative Cooper, and Chief Steward Howard established that Respondent allowed disabled employees with restrictions to light duty to return to work if the injury or disability was job related, but required an unrestricted and unconditional release before allowing a disabled employee to return to work following a nonjob related disability. I therefore conclude that Roberts' release to light duty did not terminate her right to disability benefits as Respondent's practice was to require an unconditional release from a nonjob related disability. Roberts at no time enmeshed herself in the ongoing strike in any manner to terminate her right to disability benefits. I therefore conclude that

[2] Howard impressed me as a truthful witness and I credit his testimony.

[3] An employer may not unilaterally terminate mandatory 8(d) subjects of bargaining at the expiration of a contract without first giving notice to and negotiating with the Union. *Harold W. Hinson, d/b/a Hen House Market No. 3 v. N.L.R.B.*, 428 F.2d 133 (8th Cir. 1970). Disability plans are mandatory 8(d) subjects of bargaining. *McDonnell Douglas Corporation*, 224 NLRB 881 (1976).

Roberts was entitled to disability payments from October 25, 1979, until January 7, 1980.

Employee Alton Lyon testified, and I credit his testimony, that he sustained a back injury while lifting 50-pound bags at Respondent's plant on October 12, 1979. Lyon was released to return to work on November 7, 1979. Lyon gave his medical release papers to Respondent's personnel manager who told him she would see him after the strike. Lyon did not say at the time that he wanted to go back to work, and Respondent's personnel manager did not ask Lyon if he wanted to return to work. Lyon did not return to work at the time of his release because of the strike. Lyon did nothing between October 25 and November 7, 1979, to indicate his support for the strike. In fact, Lyon crossed the picket line every other day during that time period in connection with the physical therapy treatments he was receiving for his injuries. I conclude that Lyon was entitled to disability payments from October 25 until November 7, 1979.

Employee Dorothy Johnson testified, and I credit her testimony, that she had a nonjob related disability commencing October 1, 1979, and she was not released to return to work until November 27, 1979. Johnson did nothing during that period to indicate her support of the strike except to attend union meetings where she was told that disabled employees were to have no part in the strike. Johnson took no part in the strike. Johnson indicated she made no effort to return to work after her release on November 27, 1979, until the termination of the strike. I conclude that Johnson was entitled to disability benefits from October 25, 1979 (she was paid disability benefits prior to October 25, 1979), until November 27, 1979.

Employee Marvin Grissom, on the date of the hearing of this case, was hospitalized and unable to testify. The parties stipulated that Grissom was on a nonjob related disability as of October 25, 1979. The parties further stipulated that Grissom received disability payments from October 18, 1979, until October 25, 1979. Additionally, the parties stipulated that Grissom was unconditionally released to return to his normal work duties on November 11, 1979. There is no evidence to indicate that Grissom enmeshed himself in any way in the ongoing strike during the period October 25 to November 11, 1979. I therefore conclude that Grissom was entitled to disability benefits from October 25 to November 11, 1979.

Employee Charles Tumlin testified he was on light duty disability as of October 25, 1979. Tumlin received disability payments until October 25, 1979, for his nonjob related injury. Tumlin testified he was told there was no light duty available for him. The parties stipulated that the disability certificate on file with Respondent indicated that Tumlin was unconditionally released to return to work as of November 8, 1979. Tumlin joined the strike the week of Thanksgiving 1979. I conclude that Tumlin was entitled to disability benefits from October 25 to November 8, 1979.

C. *Alleged Unilateral Elimination of Certain Holidays and Withholding of Accrued Holiday Pay*

The General Counsel alleges that since on or about January 6, 1980, Respondent has discriminated against its employee Roy Odum by withholding from him accrued holiday pay, which had accrued pursuant to a then recently expired collective-bargaining agreement between Respondent and the Union. Further, the General Counsel alleges that the holiday pay was withheld because employees of Respondent, other than Odum and certain specifically named fellow employees, engaged in activities on behalf of the Union by concertedly ceasing work and engaging in a strike. The General Counsel contends that the action by Respondent of withholding accrued holiday pay from employee Odum, whom the General Counsel alleges did not participate in the strike, constitutes a violation of Section 8(a)(3) and (1) of the Act. It is also alleged that this conduct constitutes a unilateral change in Respondent's existing holiday policy in violation of Section 8(a)(5) and (1) of the Act.

In support of these allegations, the General Counsel called employee Paul Odum as a witness. Odum has been an employee of Respondent since 1972. I credit the uncontradicted testimony of Odum. In April 1979, Odum sustained a job-related injury to the cartilage in his knee twice requiring surgery and as a result was absent from work for an extended period of time. At the commencement of the strike, Odum's disability benefits were exhausted, but he was still disabled from returning to work. Odum testified that, while disabled prior to the strike, he received pay for any regular holiday that came due.[4] However, after the advent of the strike and at a time while Odum was still disabled, Respondent ceased to pay Odum for regular holidays as set forth in the collective-bargaining agreement between the parties. Approximately a week after Thanksgiving 1979, Odum, while at the plant to pick up a workmen's compensation payment, asked Respondent's plant nurse why he had not received the Thanksgiving holiday payment. Odum testified the nurse inquired of Respondent's payroll department and then informed Odum it was because of the strike. Odum testified he did not participate in the strike in any manner.

Contrary to Respondent's contention that the discontinuance of the holiday pay was raised at the October 25, 1979, bargaining session on the morning after the contract expired and the strike commenced, I find there is no evidence in this record to support that contention. The first evidence that the Union had notice that the holiday pay had been discontinued for any disabled employee was after the fact, through the affected employee involved. There is no evidence that the Union was afforded an opportunity to negotiate the subject matter prior to Respondent making the unilateral change. Respondent's contention that the contract had expired and its "obligation ceased" with respect to holiday pay for

[4] The contract which expired on October 25, 1979, provided:

> Where an employee who is otherwise eligible for holiday pay and is absent due to an industrial accident, he shall receive holiday pay. [G.C. Exh. 2, p. 15, sec. 18.]

employees injured on the job is without merit. (See fn. 3 of this Decision.)

I find Respondent's withholding accrued holiday pay[5] from its employee Roy Odum in the circumstances of this case as outlined above violated Section 8(a)(3) and (1) of the Act. See *Wallace Metal Products, Inc.*, 244 NLRB 41 (1979). I further find that the conduct of Respondent as set forth above constitutes a unilateral change in wages and working conditions in violation of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set out in section III, above, occurring in connection with the operations of the Respondent described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(3) and (1) of the Act by withholding payment of disability benefits to the employees named in the complaint herein from October 25, 1979, through January 4, 1980.
4. Respondent violated Section 8(a)(3) and (1) of the Act by withholding accrued holiday pay from its employee Roy Odum during the period October 25, 1979, until January 4, 1980, as specified in the then controlling collective-bargaining agreement.
5. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing employee benefits by eliminating pay for the holidays alleged in the complaint which had accrued as specified in the then controlling collective-bargaining agreement.
6. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Accordingly, Respondent is ordered to pay disability benefits due to the employees named in the complaint with interest to be computed as outlined below. The period for which such reimbursement must be made is from October 25, 1979, until January 4, 1980. The disabled time period for each employee is set forth in the body of this Decision.

Having found that Respondent violated Section 8(a)(3) and (1) of the Act by withholding accrued vacation pay from its employee Roy Odum, I shall order Respondent to reimburse Odum for the holiday pay due him for the period from October 25, 1979, until January 4, 1980, backpay to be computed with interest as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977); see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). I shall also order that Respondent, upon request, bargain with the Union concerning any proposed changes in employees' holiday benefits.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[6]

The Respondent, The Sherwin-Williams Company, Morrow, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Withholding payment of disability benefits from employees for the purpose of coercing them or other employees in the exercise of their rights to engage in protected concerted activities, including strike.

(b) Refusing to bargain collectively with the Union by unilaterally and discriminatorily changing employee holiday pay for the period specified in the section of this Decision entitled "The Remedy."

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Make whole the employees listed in the complaint by paying to each what disability benefits were due them during the period October 25, 1979, until January 4, 1980, with interest pursuant to present Board law.

(b) Reimburse its employee Roy Odum and make him whole for any loss of holiday pay in the manner and for the period specified in the section of this Decision entitled "The Remedy."

(c) Upon request, bargain collectively in good faith with the Union concerning any proposed changes in the wages, hours, working conditions, and other terms and conditions of employment of Respondent's employees represented by the Union.

(d) Preserve and make available to the Board or its agents, upon request, all records necessary to analyze the amount due in the effectuation of this remedial order.

(e) Post at its Morrow, Georgia, plant copies of the attached notice marked "Appendix."[7] Copies of said

[5] The complaint alleges the holidays pursuant to the collective-bargaining agreement as being: Thanksgiving Day, Christmas Eve, Christmas Day, New Year's Eve, and New Year's Day. A reading of the contract provisions in question shows one additional holiday during that period to be the day after Thanksgiving. I therefore conclude this holiday should have been included also.

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by

Continued

notice, on forms provided by the Regional Director for Region 10, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."